IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1829 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

ANILKUMAR RAMBUJARAT MISHRA - Applicant(s)
Versus
UNION OF INDIA THRO ASHOK RAI & 1 - Respondent(s)

==========

Appearance :
MR VM DHOTRE for Applicant(s) : 1,
MR RM CHHAYA for Respondent(s) : 1,
MR DIPEN DESAI APP for Respondent(s) : 2,

==========

CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 24/10/2007

ORAL JUDGMENT

1. In the present petition, the petitioner, original accused has challenged an order dated 2.3.2007 passed by the Judicial Magistrate First Class, Viramgam below Exhibit 3 A in Criminal Case No.14837 of 2006 as upheld by an order dated 7.8.2007 passed by the learned Additional Sessions Judge, Ahmedabad (Rural) in Criminal Revision Application No. 6 of 2007 filed by the petitioner.

2. The petitioner is in employment of Indian Navy. He is a sailor by designation. A Criminal Complaint bearing No.5008 of 2006 came to be filed against the petitioner for having committed offences punishable under Sections 66-B, 65A, 65E and 116B of Bombay Prohibition Act. It is the case of the petitioner when that the alleged offence took place, he was on leave. The police upon completion of investigation, filed chargesheet against the petitioner on 2.6.2006. Respondent No.1 herein i.e. the Commanding Officer, Indian Navy filed an application on 20.7.2006 before the learned Judicial Magistrate First Class, Viramgam, who was conducting the trial against the petitioner. In the said application, a request was made that the case be transfered to Indian Navy for trial under the Navy Act, 1957 provided in Section 78 of the Navy Act and Section 475 of Criminal Procedure Code. It was also requested that the accused be delivered to the Officer of the Navy with all the case papers.

3. The learned Magistrate in the impugned order passed on the said application held that upon combined reading of Section 78 of the Navy Act, Section 475 of Criminal Procedure Code and provisions made in the Court Martial (Adjustment of Jurisdiction) Rules, 1978 (hereafter to be referred as the "Said Rules"), the case is required to be transferred to the Indian Navy. The learned Magistrate considered the decisions of various High Courts including that of the Division Bench of Kerala High Court reported in **1993 CRI.L.J. 3070 (Mangal Singh Bhatti V. Union of India and Others)**, for coming to the conclusion that the case is required to be transfered and accused is required to be delivered to the Navy Officials.

3.2 The Magistrate turned down the contentions of the petitioner that since the accusation pertains to the offience under Bombay Prohibition Act, he cannot be subjected to the Court-martial proceedings holding that as per the legal provisions any offence even under civil law is subject to the jurisdiction of the Court Martial and Naval law. Upon said conclusion, the learned Magistrate directed that the accused be delivered to the Navy Officer for further proceedings to be conducted before the Court-martial. He also ordered the transfer of the case papers to the Navy Officers.

4. Aggrieved by the said order, the petitioner preferred Criminal Revision Application No. 6 of 2002, which came to be dismissed by an order dated 7.8.2007. The petitioner is therefore, before this Court challenging the said orders passed by the Courts below.

5. Having heard the learned advocate Shri V.M. Dhotre for the petitioner and learned Additional Central Standing Council Shri Rashin Chhaya for the Union of India and learned A.P.P. Shri Dipen Desai for the State, I do not find that Courts below committed any legal error, so as to permit this court to interfere.

6. Section 475 of Criminal Procedure Code provides inter alia that the Central Government may make rules as to cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this code applies or by Court-martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs for the purpose of being tried by a Court-martial.

Section 475 of the Criminal Procedure Code reads as follow **:**

> Delivery to commanding officers of persons liable to be tried by Court-Martial :- (1) The Central Government may make rules consistent with this Code and, the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1975) and the Air Force Act, 1950 (45 of 1950) and any other law, relating to the Armed Forces of Union, for the time being in force, as to cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this code applied or by a Court-Martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs or to the commanding officer of the nearest military, naval or air force station as the case may be, for the purpose of being tried by a Court-martial.

6.2 Section 78 of the Navy Act provides inter alia that every person subject to naval law who is charged with a naval offence or a civil

offence may be tried and punished under this Act regardless of where the alleged offence was committed.

Section 78 of the Navy Act reads as follow :

Jurisdiction as to place and offence :

(1) Subject to the provisions of sub-section (2) every person subject to naval law, who is charged with a naval offence or a civil offence may be tried and punished under this Act regardless of where the alleged offence was committed.

(2) A person subject to naval law, who commits an offence of murder against a person not subject to army, naval or air force law or an offence of culpable homicide not amounting to murder against such person or an offence of rape in relation to such person shall not be tried and punished under this Act unless he commits any of the said offences -

(a) While on active service; or

(b) at any place outside India; or

(c) at any place specified by the Central Government by notification in this behalf.

6.3 As envisaged in Section 78 of Navy Act, the Central Govt. has framed the said Rules. Rules 3,4, 5 and 8 thereof which are relevant for our purpose read as follows :

> "Rule 3. Where a person subject to military, naval or air force law, or any other law relating to the Armed Forces of the Union for the time being in force is brought before a Magistrate and charged with an offence for which he is also liable to be tried by a Court-martial, such Magistrate shall not proceed to try such person or to commit the case to the Court of Session, unless -
>
> (a) he is moved thereto by a competent authority, naval or air force authority; or
>
> (b) he is of opinion, for reasons to be recorded, that he should so proceed or to commit without being moved, thereto by such authority.
>
> Rule 4. Before proceeding under clause (b) of Rule 3 the Magistrate shall give a written notice to the Commanding Officer or the competent military, naval, or air force authority, as the case may be, of the accused and until the expiry of a period of fifteen days from the date of service of the notice he shall not -
>
> (a) convict or acquit the accused under Section 252, Sub-Sections (1) and (2) of Section 255, Sub-Section (1) of Section 256 or Section 257 of the Code of Criminal Procedure, 1973 (2 of 1974), or hear him in his defence under Section 254 of the said Code; or
>
> (b) frame in writing a charge against the accused under Section 240 or Sub-Section (1) of Section 246 of the said

Code; or

(c) make an order committing the accused for trial to the Court of Session under Section 209 of the said Code, or

(d) make over the case for inquiry or trial under Section 192 of the said Code.

Rule 5. Where a Magistrate has been moved by the competent military, naval or air force authority. as the case may be, under clause (a) of Rule 3 and the commanding officer of the accused or the competent military, naval or air force authority, as the case may be, subsequently gives notice to such Magistrate that, in the opinion of such Officer or authority, the accused should be tried by a Court-Martial, such Magistrate if he has not taken any action or made any order referred to in clauses (a), (b), (c) or (d) of Rule 4, before receiving the notice shall stay the proceedings and, if the accused is in his power or under his control shall deliver him together with the statement referred to in Sub-Section (1) of Section 475 of the said Code to the officer specified in the said Sub-Section ."

"Rule 8. Notwithstanding anything in the foregoing rules, where it comes to the notice of a Magistrate that a person subject to military, naval or air force law, or any other law relating to the Armed Forces of the Union for the time being in force has committed an offence, proceedings in respect of which ought to be instituted before him and that the presence of such person cannot be procured except through military, naval or air force authorities, the Magistrate may by a written notice require the commanding officer of such

> person either to deliver such person to a Magistrate to be named in the said notice for being proceeded against according to law, or to stay the proceedings against such person before the Court-martial if since instituted, and to make a reference to the Central Government for determination as to the Court before which proceedings should be instituted,"

7. The submissions made on behalf of the petitioner be examined in light of these statutory provisions.

7.1 It is contended on behalf of the petitioner that the combined reading of the above statutory provisions makes it clear that even when a Navy Official is alleged to have committed an offence, it is not compulsory for the Magistrate to transfer the proceedings to the Court Martial. It is contended that under Section 78 of the Naval Act, the word used is “may”, which make it clear that the proceedings against Naval Official may be transferred and is optional. My attention is also invited to the provisions containing in Section 475 of Criminal Procedure Code to contend that for deciding whether a matter to be transferred to the Court- martial, the learned Magistrate has to apply his mind having regard to the Rules framed by the Central Government. It is, therefore, contention of the learned counsel for the petitioner that the Magistrate had to assign reasons for transferring the proceedings.

7.2 Second contention of the petitioner was that the chargesheet is already filed and and the witnesses are from the local area. It was therefore not desirable to transfer the proceedings to the Court-martial.

8. On the other hand, the learned counsel appearing for the respondents opposed the petition and submitted that the courts below committed no error in allowing the application of Union of India.

9. I am unable to uphold either of the contentions raised by the leaned counsel of the petitioner. It may be that under the provisions contained in Section 475 of Criminal Procedure Code, Section 78 of Navy Act and the Rules made under the said Rules, the discretion is vested with the learned Magistrate trying the offence not to transfer the proceedings to the Court-martial under given set of circumstances. However, combined reading of the above noted provisions make it clear that the primary is given to the Court-martial when officer of Military, Naval or Air force is facing criminal prosecution. Section 78 of the Navy Act makes it abundantly clear that the Court-martial would have jurisdiction to try not only naval offence, but also civil offence alleged to have been committed by the Naval Officer.

10. In the case of **Mangal Bhati V. Union of India** (Supra), the

Division Bench of Kerala High Court after examining the statutory provisions in detail made following observations :

> 14. In our view, the intention behind Section 475 of the Cr. P.C. and Rules 3, 4, 5 and 6 of the Rules is to prevent any conflict of jurisdiction. In case the military, naval or air force authorities opine that the accused is to be tried in Court Martial, the Magistrate has to stay the proceedings and deliver the accused to the said authority or officer. If such stay and delivery of accused are contemplated even at a subsequent stage as is referred to in Rule 3(a) or (b), a fortiori there should be stay and delivery of accused, if the said authority or officer intimates the Magistrate earlier and even before the stage of Rule 3(a) or Rule 3(b). That the military, naval or air force authorities have the final say in the matter is clear from Rules 3 to 6 (subject to Rules 8, 9) and this position is accepted by various High Courts. This is the view taken by the Madhya Pradesh High Court in Gopinathan v. State of M.P., AIR 1963 MP 249 : (1963 (2) Cri LJ 161); the Bombay High Court in Emperor v. Jerry D'Sena, AIR 1945 Bom 176 : (46 Cri LJ 99); the Mysore High Court in Ramanujan v. State of Mysore, AIR 1962 Mysore 196 : (1962 (2) Cri LJ 389) and the Calcutta High Court in Amarendra Chandra v. Garrison Engineer, AIR 1945 Cal 340 : (47 Cri LJ 125).
>
> 15. However, notwithstanding, the abovesaid superior position of the said military, naval or air force authorities, it is provided in Rule 8 that the Magistrate can arrest to the contrary, in situations provided in Rule 8, that the accused should be tried before the

Magistrate and, in such an event, he has to make a reference to the CentralGovernment :

"for determination as to the Court before which proceedings should be instituted."

The Magistrate could question the direction of the authority or officer only in the manner provided in Rule 8 : Ram Sarup v. Union of India, AIR 1965 SC 247 : (1965 (1) Cri LJ 236).

16. In the present case, even before any situation such as is covered by Rule 3(a) or (b) arose, the naval authority had, by letter dated 30-4-1992, requested the Magistrate to allow the accused to be tried under the Naval Law. The Magistrate had no choice but to stay the proceedings and deliver the accused to the naval authorities. The case is an a fortiori case and what is contemplated at a later stage in Rules 5 and 6 has to be done even at an earlier stage by the Magistrate. It was, of course open, because of the 'non obstante' clause in Rule 8, to the Magistrate to try to take action under Rule 8 to assert that he alone should try it and seek a reference but he has not chosen to take any such decision even after delivery of the accused. If he thought so, he has to refer the matter for decision to the Central Government. No such situation has arisen in the case. Therefore, the Magistrate was right in staying the proceedings and straightway delivering the accused to the naval authorities.

The Bench further observed that :

17. It is then argued that if the Magistrate has no discretion in the matter, why should the words 'proper

cases' be used in Section 475, Cr. P.C. ? It is true that Section 475, Cr. P.C. contemplates that when the person is brought before the Magistrate and is charged with an offence for which he is liable to be tried either by a Court to which the Cr. P.C. applies or by a Court Martial,

"such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer."

The expression 'have regard to' has come up for consideration before the Privy Council and the Supreme Court in several cases. In. certain cases the words used are 'may have regard to' and in certain other cases 'shall have regard to'. It has been stated that these words do not preclude the taking into account of other factors. In Commissioner of Income-tax v. William Diamonds, Ltd., 1958 AC 41, it was observed :

"The form of the words used no doubt lends itself to the suggestion that regard should be paid only to the two matters mentioned, but it appears to their Lordships that it is possible to arrive at a conclusion as to reasonableness by considering the two matters mentioned isolated from other factors. Moreover, the statute does not say 'have regard only' to....."

Several cases dealing with the words 'have regard to' have been referred to by the Supreme Court in M/s. Shri Sitaram Sugar Co. v. Union of India, AIR 1990 SC 1277. That was, however, a case where the words used were 'may have regard to'. In some other cases as in Perry v. Wright, 1908 (1) KB 441, where the words used were 'regard may be had', it was observed by Cozens Hardy, M.R. that 'no mandatory words are there used' and

Fletcher Moulton L.J. said, in the same case, that the factors indicated are a 'guide and not a fetter'. In another case, S.I., Syndicate Ltd. v. Union of India, AIR 1975 SC 460, the Supreme Court was dealing with the words 'shall be fixed having regard to', Beg, J. (as he then was), observed (at page 462) :

"Clause 7(2), set out above, requires the Government to fix the price 'having regard to.....'. The expression 'have regard to' only obliges the Government to consider as relevant data material to which it must have regard (see Ryots of Garabhandox v. Zamindar of Parlakumidi, AIR 1943 PC 164."

Inasmuch as the words used in Section 475 are 'shall have regard to' it is clear that the Magistrate is bound to have regard to the Rules. He cannot choose to ignore them. He may however have regard to other factors too, if not excluded by the Rules. He may, improper cases,such as for example, wherein he chooses to opt to Rule 8, make are reference of the matter to the Central Government. There could, perhaps, be other situations too, as stated in decided cases. But, if he does not treat the case as a 'proper case' in which he should so refer to the Central Government, and does not even otherwise decide to retain his jurisdiction, he is bound under Rules 5 and 6 of the Rules to deliver the accused to the authority or officer concerned. That is what happened in the present case. Here the Magistrate did not choose to act under

Rule 3(b) or under Rule 8 nor did he otherwise think it to be a 'proper case', to retain jurisdiction. His action of delivering the accused to the naval authority discloses a clear intention in that behalf and if so, he was under

Rules 5 and 6, bound to deliver the accused to the naval authorities. There is no illegality. While doing so, there was, as pointed out below, no reason to record reasons. Reasons were to be recorded only if he proceeded under Rule 3(b).

11. Considering the decision of the Division Bench of Kerala High Court and also taking into account statutory provisions noted herein above, I do not find that the learned Magistrate committed any error. In fact, he has given detailed reasons for allowing the application of the Union of India. As noted earlier, primarily it would be difficult for the learned Magistrate not to transfer the case under such circumstances. Only in appropriate cases, where it is found that for special reasons, it would be desirable to retain proceedings before himself that the Magistrate may retain the proceedings before himself. Under the circumstance, I find no merit in the petition. The same is therefore, rejected.

(AKIL KURESHI, J.)

ynvyas